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In the Supreme Court of the United States

OCTOBER TERM, 1984

DUNBAR STONE COMPANY, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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The only question properly presented by the petition is whether the determination by the Secretary of the Interior that petitioners' schist did not qualify as an "uncommon variety" of building stone is supported by substantial evidence.

1. The general mining law (the Act of May 10, 1872, 30 U.S.C. 22 *et seq.*) invites citizens of the United States to locate and remove "all valuable mineral deposits in lands belonging to the United States * * *," and, upon satisfaction of minimal re-

quirements and a very modest payment, to obtain ownership of the land as well. See, *e.g.*, *Andrus* v. *Shell Oil Co.*, 446 U.S. 657, 658-659 n.1 (1980). But, by Section 3 of the Act of July 23, 1955 (Common Varieties Act), 30 U.S.C. 611, Congress withdrew common varieties of minerals from location under the mining law, declaring that "[n]o deposit of common varieties of * * * stone * * * shall be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claims * * *." Instead, such minerals became subject to disposition under the Materials Act of 1947, 30 U.S.C. 601 *et seq.*, which provides for sale of mineral and vegetative materials on federal lands without affecting title to the land itself. The concern was that immense areas of the public domain would be appropriated without compensating benefit to the Nation if the mining laws continued to apply to common varieties of building stone and common types of sand and gravel. See *United States* v. *Coleman*, 390 U.S. 599, 603-605 (1968).

The question remains, of course, what is a "common variety." Section 3 of the 1955 Act provides that it shall not affect "deposits of [the listed] materials which are valuable because the deposit has some property giving it distinct and special value." To implement the proviso, the Department of the Interior issued a regulation that defined "[c]ommon varieties" as including "deposits which, although they may have value for use in trade, manufacture, the sciences, or in the mechanical or ornamental arts, do not possess a distinct, special economic value for such use over and above the normal uses of the general run of such deposits." 43 C.F.R. 3711.1(b). A lead-

ing judicial decision has elaborated on this test by identifying five guidelines for determining whether a mineral deposit is a common variety:

> (1) [T]here must be a comparison of the mineral deposit in question with other deposits of such minerals generally; (2) the mineral deposit in question must have a unique property; (3) the unique property must give the deposit a distinct and special value; (4) if the special value is for uses to which ordinary varieties of the mineral are put, the deposit must have some distinct and special value for such use; and (5) the distinct and special value must be reflected by the higher price which the material commands in the market place.

McClarty v. *Secretary of the Interior*, 408 F.2d 907, 908 (9th Cir. 1969).

2. The mining claims here involve land within Prescott National Forest in Arizona. Petitioners' predecessor located 13 lode claims many years ago; they were abandoned, have been declared invalid, and are no longer at issue. Directly overlying these lode claims are 13 placer claims, located in September of 1976. On February 28, 1978, the Bureau of Land Management of the Department of the Interior filed a contest proceeding charging that 13 lode claims were void for lack of a discovery and that the lands embraced within their limits were non-mineral in character. The complaint also alleged that the deposit of stone, a variety of schist called Yavapai schist, found within the limits of the 13 overlying placer claims were not a valuable mineral deposit within the meaning of Section 3 the Common Varieties Act. Pet. App. 27a.

On June 24, 1980, after a two-day hearing, an administrative law judge (ALJ) invalidated all of petitioners' mining claims. Pet. App. 26a-37a. On appeal, the Interior Board of Land Appeals (IBLA) affirmed the ALJ's decision that, although the Yavapai schist was marketable at a profit, it failed to meet the test of "unique property" outlined by the Ninth Circuit in the *McClarty* case and in the regulations for it to qualify as an "uncommon variety" (Pet. App. 14a-25a). The IBLA based this finding on the existence of vast quantities of comparable schist in the area and the absence of special economic value for petitioners' schist. Pet. App. 14a-25a. One witness had testified that 40 billion tons of schist could be found in Yavapai County and that another 16 billion tons could be found in neighboring Maricopa County. Another witness estimated the amount of stone within the claims at 60 million tons. Pet. App. 20a-24a.

While the IBLA noted that the record showed that petitioners' schist had a pleasant coloration and that it could be blasted out and broken in such a manner as to tend to maintain sharp, unfeathered edges, petitioners' witnesses failed to show that their schist could command a premium price in the market, or that it could be produced at a reduced cost, as the *McClarty* decision and the regulations require. Pet. App. 14a-22a.

3. Petitioners filed an action for a declaratory judgment in the district court challenging the IBLA's decision. The United States counterclaimed for damages and injunctive relief. On March 9, 1983, the district court granted a partial summary judgment on the declaratory judgment claim in favor of the United States (Pet. App. 12a-13a). The parties subsequently settled the counterclaim.

Petitioners appealed the holding that the 13 unpatented placer mining claims were invalid. (They did not challenge that part of the district court's decision holding that the 13 lode claims were invalid.) On January 24, 1985, the court of appeals, by an unreported memorandum, affirmed the district court's decision (Pet. App. 1a-11a). The court held that the IBLA's determinations that vast quantities of schist exist in Arizona, and that petitioners' schist lacks special economic value, were supported by substantial evidence. Pet. App. 8a. The court also held that IBLA was correct in refusing to consider the stone's unique qualities in the absence of an economic advantage. Pet. App. 9a. The court further held that since petitioners' stone did not command a premium price in any market their argument that their stone's unique qualities expanded the available market was entitled to no weight. Pet. App. 9a-12a. Finally, the court ruled that while the record showed that petitioners' schist sold for more than the average price of stone in Arizona, a neighboring company also produced schist at the same price and that at least some types of building stone sold at a much higher price than petitioners' schist. Pet. App. 10a.

4. The decision of the court of appeals is correct, and is supported by longstanding and consistent administrative and judicial construction of the relevant statutes.[1] It does not conflict either with the decisions of other circuits, or with any decision of this Court. Accordingly, further review is not warranted.

Petitioners assert (Pet. 13-19) that the Secretary and the courts applied the wrong test in determining

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[1] See, *e.g.*, *Brubaker* v. *Morton*, 500 F.2d 200 (9th Cir. 1974); *Boyle* v. *Morton*, 519 F.2d 551 (9th Cir.), cert. denied, 423 U.S. 1033 (1975).

whether they had satisfied their burden of showing that the schist on their claims was not a common variety of stone within the meaning of Section 3 of the 1955 Act. This contention is wholly without merit. The IBLA found that schist exists in vast quantities in Arizona, and that petitioners' schist had no "unique property" that would render it an uncommon variety of stone. The record showed that petitioners' schist did not command either a premium price or reduced production cost. Petitioners' attempt to fashion a test, whereby building stone need only have "some property" giving the deposit distinct and special value, is meaningless.

Petitioners' argument (Pet. 19-23) that IBLA and the courts below failed to demonstrate that petitioners' stone is a common variety presents no issue for this Court. The IBLA found "that Dunbar schist lacks special economic value," and the court of appeals held (Pet. App. 8a) that this finding was supported by substantial evidence. Finally, petitioners' complaint (Pet. 23-28) that the Ninth Circuit rejected consideration of technical or economical data which petitioners submitted for the first time on appeal in this case is incorrect. Although the court could have rejected the proffered evidence as untimely, the court did consider it and found that it did not avail petitioners. The court of appeals noted petitioners' attempt to compare their schist, which sells at $55.00 per ton, with all stone sold in Arizona, which sold at $4.24 per ton and which figure included crushed stone, which sells at $3.58 per ton. The court noted that the record showed that a nearby competitor also produces stone at about the same price as do petitioners. Pet. App. 10a. Petitioners' data also showed that the average price of building stone in

Arizona sold for $113.04 per ton, more than double the price of petitioners' stone. Accordingly, the court correctly concluded (*ibid.*) that petitioners' data proved nothing.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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